No. 94-1033

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

COMPUTER CURRICULUM CORPORATION,
Petitioner,
v.
INSTRUCTIONAL SYSTEMS, INC.
and
DEBORAH T. PORITZ, ATTORNEY GENERAL
OF THE STATE OF NEW JERSEY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE SOFTWARE PUBLISHERS ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The National Association of Manufacturers of the United States of America ("NAM"), and the Software Publishers Association ("SPA"), hereby move, pursuant to Rule 37.2 of the rules of this Court, for leave to file the attached brief *amici curiae* in support of petitioner. Counsel for petitioner has consented to the filing of this brief, but counsel for respondent Instructional Systems, Inc. and respondent Deborah T. Poritz, Attorney General of the State of New Jersey, have declined.

The NAM is a voluntary business association of more than 13,000 companies and subsidiaries, employing 85 percent of all manufacturing workers and producing more

than 80 percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with the NAM through its Associations Council and National Industrial Council.

The SPA is the principal trade association of the personal computer software industry. With over 1,100 members ranging from well-known public companies to numerous smaller private companies, the SPA represents 90 percent of U.S. software publishers. Members of the SPA account for more than seventy-five percent of total worldwide personal computer software sales and represent some of the United States' most technologically advanced, competitive and innovative companies.

The NAM and the SPA are vitally interested in ensuring that state regulation that affects interstate commerce is fair, reasonable, and properly restrained by clear constitutional principles. The NAM and the SPA also believe that the consuming public is best served when parties are free to enter into voluntary and mutually satisfactory contractual arrangements, and that those market-based agreements will best promote the efficient and economical distribution of goods and commodities from producers to consumers.

This case involves issues of industry-wide importance. First, the specific law in question affects manufacturers throughout the country because New Jersey is a major distribution center. Second, the rationale relied on by the decision below would sanction extraterritorial regulation by states of any producer who enters into any contract within the state. Because of the NAM's broad representation of manufacturing companies, and the SPA's broad representation of software publishers, they are familiar with the import of the decision below with respect to interstate commerce and believe that their views will be of assistance to this Court.

For these reasons, the NAM and the SPA ask that their motion be granted.

Respectfully submitted,

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BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE SOFTWARE PUBLISHERS ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

The interest of *amici curiae* is set forth in the accompanying motion.

STATEMENT

The decision below upheld a New Jersey statute that has been interpreted by the highest state authority to prohibit out-of-state suppliers from terminating multistate distribution contracts with New Jersey-based distributors,

unless they establish certain preconditions. Under the statute, such contracts must be renewed unless the supplier proves that the distributor substantially breached the agreement—even if the distributor expressly agreed that the contract would expire on a date certain and that the law of a different state was intended to govern the contract.

The Third Circuit rejected petitioner's argument that, under the Commerce Clause, New Jersey has no power to require an out-of-state supplier to renew an expired contract that covers distribution and sales beyond New Jersey's borders. Instead, the court ruled that New Jersey's regulation should be viewed as an interpretive rule of contract, and as such can be enforced with respect to commerce anywhere in the United States, so long as other states have not enacted positive law that imposes inconsistent obligations.

ARGUMENT

The Third Circuit's decision permits a single state to prevent any changes in the systems used for distribution of products and services in other states. That decision warrants review for two reasons. First, it endorsed as constitutional a form of state regulation that is inherently protectionist and thus upsets the equilibrium between states that is essential to the national economy. Because supervision of the extent to which one state may constitutionally impose its policy choices on other states is a core function of this Court, and because the decision below sanctioned overreaching by one state at the expense of others, the question presented here is clearly worthy of this Court's consideration.

Moreover, there would be serious practical consequences if the Court were to defer its consideration of the issue until some later opportunity arises. The Third Circuit's decision has upset settled expectations of the many companies that distribute their products through

New Jersey distributors. In such a significant commercial context, uncertainty about the basic rights of contracting parties is intolerable. And so long as the decision below remains in place, producers will be forced to refrain from changing to new and more efficient means of distribution. For these reasons, the Court should grant the petition for a writ of certiorari.

I. THE THIRD CIRCUIT'S DECISION TO PERMIT STATES TO REGULATE COMMERCE OUTSIDE THEIR BORDERS IS INCONSISTENT WITH THIS COURT'S COMMERCE CLAUSE JURISPRUDENCE.

By freezing distribution contracts between suppliers, wherever located, and New Jersey-based distributors, the New Jersey statute upheld by the Third Circuit permits New Jersey to prevent suppliers from terminating New Jersey-based distributors, without regard to the actual contractual terms agreed to by the New Jersey distributor, and without regard to the interests of the other states where the supplier's products will be sold and/or delivered. Thus, for example, an out-of-state manufacturer is not free to replace a New Jersey-based distributor with a Massachusetts-based distributor even to sell and/or distribute products in Massachusetts, and even though the New Jersey distributor's contract has expired. Essentially, once a supplier enters into a contract with a New Jersey-based distributor, it is caught in New Jersey's web. The availability, price, delivery and selection of products in *entirely different states* is held hostage unless and until the manufacturer undertakes the expense of highly fact-intensive litigation and successfully meets the restrictive test imposed by New Jersey law.[1]

The New Jersey law upheld below is precisely the type of protectionist regulation this Court has long held unconstitutional under the dormant Commerce Clause. Even

[1] Under that test, even *bona fide* business reasons are insufficient to justify termination of the New Jersey-based distributor. *See* Pet. at 2.

where a state is regulating suppliers *within* its borders, this "Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere" and has declared them "virtually per se illegal." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970). The statute at issue in this case lacks even that connection with the state. The New Jersey law effectively requires *out-of-state producers* selling and delivering products to *out-of-state buyers* to continue to use New Jersey firms as their distributors—even if an out-of-state distributor (or the manufacturer itself) could distribute the products more efficiently.

That New Jersey may have legitimate local interests is irrelevant, because the Commerce Clause does not permit New Jersey to hobble businesses from other states in their competition with New Jersey firms. *See Brown-Forman Distillers Corp. v. N.Y. Liquor Auth.*, 476 U.S. 573, 580 (1986) (although a state may seek benefits for its citizens, "it may not insist that producers or consumers in other States surrender whatever competitive advantages they may possess"); *Healy v. The Beer Institute*, 491 U.S. 324, 346 (1989) (Rehnquist, C.J., dissenting) (noting that, in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935), the Court struck down a New York price minimum aimed at equalizing the wholesale cost of milk because it forced out-of-state firms "to give up the natural advantage which they would otherwise have obtained" from their lower production costs).

But, in fact, hobbling out-of-state businesses is precisely what the New Jersey law does. When a Maine-based distributor and a New Jersey-based distributor compete for the right to distribute a supplier's products *in Maine*—after the supplier's contract with the New Jersey distributor has expired—the New Jersey statute grants the New Jersey company a decisive advantage. It imposes a heavy cost on the supplier if it chooses the Maine-based distributor (litigation and/or damages), but no cost if it continues to use the New Jersey distributor.

A. The Distinctions Relied On By The Third Circuit Do Not Support Its Departure From *Baldwin*, *MITE*, *Brown-Forman*, and *Healy*.

It is well established that "the Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy v. The Beer Institute*, 491 U.S. at 336 (quotation omitted). Moreover, as the Third Circuit recognized, the mere fact that the regulated parties have some connection to the state seeking to impose its will on them "does not validate the law if it regulates . . . out-of-state transactions"—even if it is the parties' in-state activities that trigger application of the law. *Brown-Forman*, 476 U.S. at 580; *see also Edgar v. MITE Corp.*, 457 U.S. 624, 641-42 (1982).

The distinction relied upon by the Third Circuit to insulate New Jersey's regulation is a distinction without a difference. The Third Circuit's ruling was based on that court's view that this particular regulation should be considered a rule governing the interpretation of contracts, rather than an independent regulation. But whatever effect may be given to interpretive rules that merely are designed to provide background rules for determining the parties' intent, a different result must obtain where, as here, the state is imposing its own substantive contract terms without regard to an explicit and contrary agreement between the parties. Most if not all of the substantive rules this Court has invalidated as unconstitutional extraterritorial regulations could as easily have been viewed, or drafted, as rules governing the interpretation of contracts. For example, the regulation invalidated in *Baldwin* would have had the same effect if the law had provided that contracts between wholesalers and New York retailers for the purchase of milk include an implied precondition that the wholesaler purchased the milk for a price equal to or greater than a designated

minimum. Similarly, the rules invalidated in *Brown-Forman* and *Healy* could as easily have imposed a term on contracts to sell liquor within the state, setting the price at no higher than the seller is asking in any other state that month.

The Third Circuit's rationale elevates form over substance. The limitations imposed by the Commerce Clause are limits on the power of a state to regulate commerce in other states, and it is immaterial how that power is exercised. *Healy*, 491 U.S. at 336. The Third Circuit's extraordinary ruling to the contrary plainly merits review.

B. The Third Circuit's Rationale Vitiates The Bar Against Extraterritorial Regulation Of Commerce.

The Third Circuit's rationale has no limit. New Jersey happens to have enacted legislation that permits a supplier to disengage from a relationship with a New Jersey distributor (though only if the distributor has materially breached the contract terms). *See* Pet. at 2. But the Third Circuit's treatment of the Commerce Clause question would have been no different if New Jersey had instead simply required all contracts made with New Jersey distributors to continue so long as the distributor remained in business. Under such a law, a multistate contract covering the mid-Atlantic, for example, would remain in effect even if the New Jersey distributor refused to deliver products outside the state, thereby permanently depriving stores and consumers in other states of the supplier's product.

Similarly, under the Third Circuit's rationale, a state could enact a law making all contracts with New Jersey distributors exclusive contracts, even if the parties had bargained for a non-exclusive relationship. Or Kansas could impose, as a contract term, a requirement that all Kansas franchisees must be permitted to veto any license by their franchisor to another franchisee within 25 miles,

even if the proposed licensee operated across the border in Missouri. Kansas franchisees would then be in the enviable position of being able to veto competitors in Missouri. *Cf. Fireside Nissan, Inc. v. Fanning*, 30 F.3d 206 (1st Cir. 1993) (construing a similar state law as not applying extraterritorially).

Nor would such rules necessarily be limited to protecting in-state distributors and franchisees. Under the Third Circuit's rationale, a state with an environmentalist mission could enact a law providing that any contract—written or oral—for sale of a product to an in-state company shall be construed to include a term requiring the seller's manufacturing plant (regardless of location) to comply with prescribed environmental standards. And a state concerned with national employment could enact a rule providing that any contract for sale of a product to an in-state company shall be construed to include the seller's promise that its manufacturing plant is built solely with U.S. materials or uses machinery made solely with U.S. components.

C. The Third Circuit's Rationale Permits A State To Impose Its Policy On Neighboring And Even Distant States.

The Third Circuit's assumption that state law does not violate the Commerce Clause absent a showing that other states impose "inconsistent obligations" is contrary to this Court's decisions and ignores the palpable conflict between rule-based regulation and market-based regulation of commercial activities. Even if New Jersey's rule did not expressly discriminate against would-be distributors and franchisees in other states, it would nonetheless run afoul of the Commerce Clause because it imposes New Jersey's regulatory policy on the sale and distribution of products in other states, without regard for the policies of those states.

The Massachusetts legislature, for example, understandably could be far more concerned with ensuring that its consumers receive the benefit of highly competitive, flexible, and responsive distribution arrangements than with giving distributors a powerful club against suppliers. In addition, in view of that state's many small biotechnology, software and computer companies, which must rely on medical and computer distribution industries dominated by a few huge, multistate companies, the Massachusetts legislature could also be concerned that suppliers are often in a weaker bargaining position than distributors.[2] Further, the Massachusetts legislature could conclude that, even when distributors are in a weaker bargaining position than suppliers, New Jersey's regulation is not a solution; it merely creates a different problem by transferring all power to the distributor. Nonetheless, even if Massachusetts adopted a considered policy to rely on the free marketplace to safeguard its consumers and new industries, New Jersey would override that policy choice in every case where a manufacturer had previously chosen to distribute in Massachusetts through a New Jersey company.

This is the very kind of overreaching the Commerce Clause has long been held to forbid. The Third Circuit's assertion to the contrary—that states may regulate commerce wholly outside their boundaries so long as other states have not adopted rule-based regulations imposing "inconsistent obligations"—warrants immediate review.

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[2] Producers and manufacturers are often smaller and less able to dictate terms than distributors. In some industries—for example, agriculture, music (records, CDs, tapes), magazines, computer equipment and software—this is the norm. Petitioner in this case was a start-up company begun by two Stanford University professors in a garage.

II. THE QUESTION NEEDS TO BE RESOLVED NOW.

Because the Third Circuit's "rule occurs in the commercial context, where advance planning of great precision is most obviously a necessity," [3] it is not appropriate to leave these questions to percolate further in the lower courts. This Court has long recognized that commercial undertakings require clear rules establishing the boundaries of state authority to impose obligations, because a clear rule "encourages settled expectations and, in doing so, fosters investment by businesses and individuals." *Quill Corp. v. North Dakota*, 112 S. Ct. 1904, 1915 (1992).

The decision below affects far more than the parties before that court. Because New Jersey is a major center of regional and national distributors, the decision has far-reaching consequences for interstate commerce and upsets the settled expectations of companies throughout the country, which until this litigation had no reason to expect the New Jersey law would be interpreted to apply extraterritorially, much less that such application would be found consistent with the Commerce Clause.[4]

In addition, nine other states have laws similar to New Jersey's and "[t]he number of states enacting laws restrict-

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[3] *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2809 (1992) (citations omitted).

[4] New Jersey's location and access to transportation have made it a major distribution center. Not only is New Jersey located close to the major metropolitan areas of New York City and Philadelphia, but it is what is known as a multimodal transportation hub, with access to a major international airport (Newark Airport), a prominent container port (Port Elizabeth), freight trains, and major highways. In addition, peculiarities such as the absence of railroad bridges over the sections of the Hudson River convenient to New York and southern Connecticut—requiring that freight sent by rail from west of the river be broken down or transferred and shipped by truck from New Jersey to points East—have made multi-state distributors based in New Jersey a natural choice for suppliers throughout the country.

ing a franchisor's sale or termination of franchises is rapidly increasing."[5] This development is a matter of concern for "every supplier and distributor of goods and services because these statutes have been held to apply to far more than the traditional fast food hamburger operation."[6] As in New Jersey, many such laws have been interpreted to cover consumer product distributors and even industrial product distributors.[7] At least one of these state laws has already been determined to reach distribution arrangements beyond the state's borders.[8]

Furthermore, the Third Circuit's rationale leaves businesses no opportunity to stabilize their relationships by entering into clear contracts permitting each party to undertake investment and planning decisions with confidence that their agreements will be enforced. Under the Third Circuit's rationale, even the most explicit contractual terms must be disregarded if the state chooses to impose a contrary obligation on one of the parties. Thus, until the decision below is set aside, suppliers cannot make investment and business decisions in reliance on the Commerce Clause to prevent states from regulating commerce wholly outside their borders, and they cannot ensure predictable distribution arrangements through contractual agreements. Accordingly, until this Court resolves the issues presented by the Third Circuit's decision, a broad range of interstate commercial transactions cannot be undertaken with certainty.

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[5] Andre R. Jaglom, "The Broad Scope of Franchise Laws: Traps for the Distribution Contract Drafter," in *Corporate Counsel's Guide to Distribution Counseling* 5.002 (1994).

[6] *Id.*

[7] *Id.*

[8] *See Wilburn & Associates v. Jack Cartwright, Inc.*, Bus. Franchise Guide ¶ 7645 (E.D. Wis. 1979); *L-O Distributors, Inc. v. Speed Queen Co.*, 611 F. Supp. 1569 (D. Minn. 1985) (interpreting Wisconsin law).

Finally, the Third Circuit's contract rationale also gives states a powerful tool for imposing protectionist regulations far beyond their borders. Such rules could involve not only the termination of franchises or distribution arrangements but also any other aspects of those arrangements. Because regional and nationwide distribution arrangements are common in most industries, and dominant in many, such rules would substantially disrupt commerce throughout the nation.[9]

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[9] For example, distribution in the computer and software industry is dominated by three mega-distributors: Ingram Micro, Merisal, and TechData. Far from a highway hamburger stand or a neighborhood copy shop, Merisal grossed $3.1 billion in sales in fiscal 1993 and projected $5 billion in fiscal 1994. Computer Reseller News, Mar. 14, 1994, at 37. Similarly, those involved in pharmaceuticals have observed the growing consolidation of the pharmaceutical distribution industry, and predict: "In a few years there are going to be a few big wholesalers that will control the industry." Chain Drug Review, Nov. 2, 1994, at 22 (statement by Alan Glenn of Drug Guild, the ninth largest distributor). Similarly, industries as diverse as office products and music (records, tapes, CDs) are increasingly relying on multistate and even national distributors. *See* The Buffalo News, Sept. 5, 1993 (article on BasicNet, formed by the merger of 32 office products distributors); Billboard, Sept. 11, 1993, at 51 (discussing the growing reliance on national distributors).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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